Supreme Court, U.S.
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No. 04-1709

IN THE
Supreme Court of the United States

UNITED STATES,

Petitioner,

v.

CALIFORNIA FEDERAL BANK, FSB,

Respondent.

On Cross-Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

MARK A. PERRY
Counsel of Record
ANDREW S. TULUMELLO
PAUL BLANKENSTEIN
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Counsel for Respondent

QUESTION PRESENTED

Based upon this Court's decision in *United States* v. *Winstar Corp.*, 518 U.S. 839 (1996), both courts below found that the undisputed facts established that the government had entered into valid and binding contracts with respondent California Federal Bank. The sole question presented by the government's cross-petition is whether this Court should revisit those concurring determinations.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

All of the parties to the proceedings in the court of appeals are listed in the caption of this petition.

Pursuant to this Court's Rule 29.6, undersigned counsel state that Citibank (West), FSB is the parent corporation of CalFed. CalFed merged into Citibank (West), FSB on November 13, 2002. Citibank (West), FSB is a wholly owned subsidiary of Citibank (West) Holdings, Inc., which is a wholly owned subsidiary of Citibank (West) Bancorp, Inc. Citibank (West) Bancorp, Inc. is a wholly owned subsidiary of Citicorp Banking Corporation, which is a wholly owned subsidiary of Citicorp. Citicorp is a wholly owned subsidiary of Citigroup Holdings Company, which is a wholly owned subsidiary of Citigroup Inc., a publicly traded company. No other publicly traded company owns 10 percent or more of CalFed's stock.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

STATEMENT 1

ARGUMENT 9

CONCLUSION 20

TABLE OF AUTHORITIES

Page

Cases

Anderson v. *United States*,
344 F. 3d 1343 (Fed Cir. 2003) 14

Bailey v. *Railroad Co.*,
84 U.S. 96 (1873) 16

Charter Fed. Sav. Bank v. *OTS*,
976 F.2d 203 (4th Cir. 1992) 16, 17

Cienega Gardens v. *United States*,
162 F.3d 1123, *superseded by* 194 F.3d
1231 (Fed. Cir. 1998) 14

D&N Bank v. *United States*,
331 F.3d 1374 (Fed. Cir. 2003) 14

Exxon Co., U.S.A. v. *Sofec, Inc.*,
517 U.S. 830 (1996) 10

Fifth Third Bank v. *United States*,
402 F.3d 1221 (Fed. Cir. 2005) 14

Goodman v. *Lukens Steel Co.*,
482 U.S. 656 (1987) 11

*Mobil Oil Exploration & Producing
Southeast, Inc.* v. *United States*,
530 U.S. 604 (2000) 19

National R.R. Passenger Corp. v. *Atchison,
Topeka, & Santa Fe Ry.*, 470 U.S. 451
(1985) 17

Ryan v. *United States*,
136 U.S. 68 (1890) 16

Steinke v. *Sungard Fin. Sys., Inc.*,
121 F.3d 763 (1st Cir. 1997) 16

United States v. *Johnston*,
268 U.S. 220 (1925) 11

United States v. *Winstar Corp.*,
518 U.S. 839 (1996) ..... *passim*

Statutes

28 U.S.C. § 1254(1) 1

Other Authorities

1 A. Corbin, *Corbin on Contracts* § 2.10
(1993) 16

3 A. Corbin, *Corbin on Contracts* § 573
(1960) 16

Financial Institutions Reform, Recovery, and
Enforcement Act, Pub. L. No. 101-73,
103 Stat. 183 3

I E. Farnsworth, *Farnsworth on Contracts*
§ 3.3 (1998) 16

Restatement (Second) of Contracts § 209
(1983) 16

Stern et al., *Supreme Court Practice* § 4.14
(7th ed. 1993) 11

BRIEF FOR RESPONDENT IN OPPOSITION

California Federal Bank ("CalFed") respectfully submits this brief in opposition to the government's conditional cross-petition for a writ of certiorari.[1]

OPINIONS BELOW

There are two opinions of the court of appeals. The first (04-1557 Pet. App. 1a-17a) is reported at 245 F.3d 1342 (2001). The underlying opinion of the trial court regarding remedies (04-1557 Pet. App. 18a-52a) is reported at 43 Fed. Cl. 445 (1999), and the opinion of the trial court regarding liability (04-1557 Pet. App. 57a-121a) is reported at 39 Fed. Cl. 753 (1997). The second opinion of the court of appeals (04-1557 Pet. App. 122a-143a) is reported at 395 F.3d 1263 (2005). The underlying opinion of the trial court (04-1557 Pet. App. 144a-173a) is reported at 54 Fed. Cl. 704 (2002).

JURISDICTION

The judgment of the court of appeals was entered on January 19, 2005. On April 7, 2005, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including May 19, 2005; the petition in No. 04-1557 was filed on that date and docketed on May 20, 2005. The government's conditional cross-petition in No. 04-1709 was docketed on June 20, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

On summary judgment, the Court of Federal Claims found that the undisputed evidence in this case estab-

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[1] CalFed's separate petition for a writ of certiorari is pending in this Court as No. 04-1557.

lished that the government had entered into a *Winstar*-type contract with CalFed to allow CalFed to include goodwill resulting from three supervisory mergers as regulatory capital for specified periods. *See generally United States* v. *Winstar Corp.*, 518 U.S. 839 (1996) (holding that United States is liable for breach of goodwill contracts). The Federal Circuit, which reviewed the trial court's liability determination *de novo*, affirmed. The government now concedes that a contract was formed in one of the transactions, but disputes contract formation in the other two even though they were substantively identical to the first.

1. During the early 1980s, in the midst of the worst savings and loan crisis since the Great Depression, the federal government found itself facing deposit insurance liabilities that threatened to bankrupt the government's insurance fund. *Winstar*, 518 U.S. at 846-47. As a means of avoiding its insurance liability, and as an alternative to government takeovers of failing thrifts, the government encouraged healthier thrifts, such as CalFed, to take over the failing thrifts through so-called "supervisory mergers." *Id.* at 847.

As this Court stated in *Winstar*, "the principal inducement for these supervisory mergers was an understanding that the acquisitions would be subject to a particular accounting treatment that would help the acquiring institutions meet their reserve capital requirements imposed by federal regulations." 518 U.S. at 848. This special regulatory accounting treatment was essential because it permitted the acquiring institutions to count the liabilities of the acquired failing thrifts as "supervisory goodwill," *i.e.*, as an asset for purposes of regulatory capital requirements. *Id.* at 849-50; *id.* at 921 (Scalia, J., concurring in judgment) (goodwill promises were the "*sine qua non*" of the supervisory mergers). This use of supervisory goodwill allowed the acquiring thrifts to meet their regulatory obligations and "to leverage more loans (and [they] hoped, make more profits)."

Id. at 851. The acquiring thrifts were allowed to amortize the supervisory goodwill obtained in the acquisitions over extended periods (up to 40 years), which further allowed the thrifts to satisfy regulatory capital requirements. *Id.* at 852-53.

In 1989, Congress passed the Financial Institutions Reform, Recovery, and Enforcement Act ("FIRREA"), Pub. L. No. 101-73, 103 Stat. 183, which made enormous changes in the structure of federal thrift regulation. *Winstar*, 518 U.S. at 856. Most important for present purposes, FIRREA mandated the promulgation of regulations requiring thrifts to maintain levels of regulatory capital that could not include supervisory goodwill (either immediately or after a 5-year phase-out). *Id.* at 857. In effect, the FIRREA-mandated regulations eliminated the favorable treatment of goodwill promised by the government as the principal inducement to hundreds of thrifts involved in supervisory mergers.

In *Winstar*, which involved three "test" cases, this Court held that the new regulatory capital requirements imposed by FIRREA breached the goodwill contracts arising out of the supervisory mergers. 518 U.S. at 870. Rejecting any notion that the government was entitled to "special rules" when contracting, the Court reaffirmed "the general principle that, '[w]hen the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals.'" *Id.* at 895 (citation omitted). The Court explained that the goodwill contracts, which were based upon the acquiring thrifts' assumption of the failing thrifts' liabilities, involved the transfer of valuable consideration designed to prevent or mitigate an impending crisis in the thrift industry and thereby save the government's insurance fund from financial collapse. *Id.* at 886-87, 869, 906, 908; *id.* at 918 (Breyer, J., concurring); *id.* at 919 (Scalia, J., concurring in judgment). Accordingly, the Court affirmed the Fed-

eral Circuit's finding of liability and remanded the cases for a determination of remedies. *Id.* at 910.

2. In the early 1980s, CalFed entered into supervisory merger agreements with the government in connection with three separate transactions: the "Southeast" transaction, the "Brentwood" transaction, and the "Family" transaction. In each instance, the government's goodwill promises induced CalFed, which "was a relatively healthy thrift" (04-1557 Pet. App. 19a), to acquire thrifts on the verge of failure. The government now concedes that the Southeast transaction resulted in a goodwill contract that the government breached (U.S. Pet. 4), but nonetheless asserts that no contract arose from the Brentwood and Family transactions. Those two transactions were identical to the Southeast transaction in all material respects, except that neither included an "Assistance Agreement" because, unlike in Southeast, the government provided no financial assistance as part of the transactions.

a. In 1981, CalFed agreed to merge with three Georgia thrifts and one Florida thrift ("the Southeast institutions"). This agreement was conditioned on the Federal Savings and Loan Insurance Corporation (FSLIC) and the Federal Home Loan Bank Board (FHLBB) granting "regulatory forbearances including net worth compliance waivers satisfactory to California Federal" and "an indemnity agreement for unknown material events and other contingencies." A5002175.[2]

CalFed proceeded to negotiate with the government, offering to acquire the Southeast institutions in exchange for $9 million in assistance, a forbearance by the FHLBB and the FSLIC from "any action against California Federal . . . for failure to comply with reserve and

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[2] As in the cross-petition (U.S. Pet. 5 n.1), record references are to the Joint Appendix filed with the court of appeals in the first appeal.

net worth requirements and scheduled item limitations insofar as such noncompliance is due to the acquisition of" the Southeast institutions, and the amortization over thirty to forty years of any goodwill resulting from the acquisition, as well as the right to include the unamortized goodwill in regulatory capital. A5002171-73.

The FSLIC accepted CalFed's offer. In February 1982, the FSLIC and CalFed entered into an "Assistance Agreement" providing that in partial exchange for assuming the Southeast institutions' $305.67 million in net liabilities, CalFed would receive a $9 million capital credit from the FSLIC. 04-1557 Pet. App. 3a. CalFed also received a forbearance letter permitting the excess liabilities to be recorded as supervisory goodwill to be includable as regulatory capital and amortized over 35 to 40 years. *Ibid.* The Assistance Agreement included a provision incorporating the forbearance letter. *Id.* at 4a.

b. In 1982, CalFed agreed to acquire the Brentwood Savings and Loan Association and assume $314.63 million in net liabilities from the failing thrift. 04-1557 Pet. App. 4a. As in the Southeast transaction, the Brentwood agreement was conditioned on CalFed's securing from the FSLIC and the FHLBB certain regulatory forbearances, as well as an agreement to include the supervisory goodwill resulting from the acquisition in calculating regulatory capital. A5002254-64; A5002329-31.

Once it had entered into a conditional agreement with the thrift, CalFed, as it had in the Southeast transaction, proceeded to negotiate with the government. CalFed proposed to acquire Brentwood in exchange for receiving the same sort of forbearances and waivers the government had agreed to in the Southeast transaction. A5002332-33. In particular, CalFed requested the FHLBB's approval of "the amortization [over 35 years] of any goodwill created." A5002325; 04-1557 Pet. App. 4a. CalFed noted that its acquisition of the failing thrift would "avoid great expenditures of resources of the FSLIC" and emphasized that "[t]he types of waivers

and forbearance requested are important to CalFed in providing an adequate basis for CalFed's management and directors to finalize the proposed transaction." A5002331, 5002334.

The government concluded that "FSLIC assistance" would be "necessary" without the CalFed merger. A2000242, A200249. Consequently, on September 30, 1982, the FHLBB approved the Brentwood acquisition, recommending in an internal memorandum that amortization of supervisory goodwill "be granted" and stating that the "association should be allowed to use regulatory accounting procedures in reports to the Board." A5002595. The next day, the FHLBB issued a forbearance letter stipulating, per CalFed's request, that the resulting association could amortize over 35 years any goodwill created by the acquisition and count that goodwill for regulatory capital purposes. 04-1557 Pet. App. 3a. The FHLBB also agreed not to enforce its net worth requirements for a period of five years to the extent that CalFed's failure to meet the requirements was attributable to the assets or liabilities acquired from Brentwood. *Ibid.*

Unlike CalFed's offer in the Southeast transaction, its Brentwood offer did not request a cash payment. Consequently, the Brentwood transaction did not involve an Assistance Agreement. 04-1557 Pet. App. 4a.

c. The next year, 1983, CalFed entered into a contract with Family Savings and Loan Association to acquire that Nevada thrift. As in the Southeast and Brentwood transactions, CalFed conditioned the merger agreement on the FHLBB's approving the amortization over 40 years of any goodwill created, and on the government's granting certain regulatory forbearances. A52002340-44.

Just as in the Southeast and Brentwood transactions, CalFed then submitted its merger application to the government, again conditioning its proposal to acquire

Family upon the regulators' approval of the now-familiar forbearances and waivers, including the right to amortize the goodwill produced by the acquisitions over 40 years and to include the unamortized goodwill in regulatory capital. 04-1557 Pet. App. 4a. The FHLBB characterized CalFed's submission as an "offer submitted" and a "proposal . . . acceptable to the FSLIC" that would "present the lowest expense to the Corporation." A5002557. In a resolution dated January 5, 1983 and a forbearance letter of the same date, the government accepted CalFed's offer. A5002559-60, A5002624-26; 04-1557 Pet. App. 5a. CalFed assumed $17.74 million in net liabilities through the acquisition. *Ibid.*

As in the Brentwood transaction, because CalFed did not request a cash payment, its agreement with the government did not involve an Assistance Agreement. 04-1557 Pet. App. 4a.

3. Relying on *Winstar* and black-letter contract law, then-Chief Judge Smith of the Court of Federal Claims granted summary judgment in favor of CalFed on the issue of liability in all three transactions. 04-1557 Pet. App. 103a. He began by observing that "[b]ecause the dollars at stake appear to be so large the government has raised legal and factual arguments that have little or no basis in law, fact or logic," and specifically castigated the government for its efforts "to relitigate the core *Winstar* liability issues in every case." *Id.* at 60a.

a. After reviewing the extensive documentary record surrounding each of the three CalFed transactions, Judge Smith held that in each case, the government made binding contractual promises regarding the use of goodwill in order to induce CalFed into acquiring the net liabilities of the failing thrifts. He expressly rejected the government's contention that an Assistance Agreement is a necessary element of a *Winstar*-type contract: "[T]he factual record[ ] . . . show[s] intent to contract with the government for specified treatment of goodwill, and documents such as correspondence, memo-

randa, and Bank Board resolutions confirm that intent .... [T]he absence of an [Assistance Agreement] should be irrelevant to the finding that a contract existed." 04-1557 Pet. App. 105a. Based on the undisputed evidence, the court "conclude[d] that contracts existed between CalFed and the government as to the Brentwood and Family transactions," and that "purchase accounting and amortization of goodwill were essential terms of the negotiated transactions." *Id.* at 107a & n.22.

b. The court of appeals, which reviewed the question of contract formation *de novo*, affirmed Judge Smith's liability determinations. 04-1557 Pet. App. 6a-10a. Citing the "contemporaneous documents and surrounding circumstances that included forbearance letters," the Federal Circuit held that the government entered into legally binding goodwill contracts in each of the three CalFed transactions. *Id.* at 7a. The court explained that the absence of an Assistance Agreement in the Brentwood and Family transactions "is not dispositive of the issue of contract formation between the government and CalFed," and agreed with the lower court that "the factual record" surrounding the transactions established the existence of legally binding contracts. *Ibid.*

The court of appeals' ruling, like Judge Smith's, rested on a close review of the documentary evidence: "Based on all of the contemporaneous documents in each of the three transactions, the FHLBB and the FSLIC were contractually bound to recognize the supervisory goodwill and the amortization periods reflected in the forbearance letters." 04-1557 Pet. App. 8a. The Federal Circuit concluded that "[i]t is clear from the documents" that the parties manifested an intent to enter into a legally binding contract, and further observed that "[t]he documentary evidence for both the Brentwood and Family transactions" was "precisely the type of evidence relied upon by the *Winstar* courts to establish the existence of contracts between acquiring thrifts and the

government." *Id.* at 10a. Consequently, "[j]ust as in *Winstar* . . . all of the necessary elements of contract formation are here, and the parties are bound by the terms of that contract." *Id.* at 9a.[3]

ARGUMENT

After an extensive review of the contemporaneous documentary record and the surrounding factual circumstances, the Court of Federal Claims and the United States Court of Appeals for the Federal Circuit both concluded that the government made contractual goodwill promises in exchange for CalFed's acquisition of Brentwood and Family. Further review of those determinations, which do not conflict with any decision of this Court or any other court, are amply supported by the undisputed evidence in the summary judgment record, and necessarily follow from a straightforward application of this Court's decision in *Winstar*, is unwarranted.

1. The government invites this Court to undertake a third review of the documentary evidence surrounding the Brentwood and Family transactions, and render a decision reversing the determinations of the two lower courts that contracts were formed in connection with those transactions (just as a contract was concededly formed in the substantively identical Southeast transactions). The government concedes that the lower courts'

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[3] Interlocutory petitions were filed by both CalFed (No. 01-592) and the government (No. 01-698); they were denied by this Court. In a subsequent appeal, the Federal Circuit rejected the government's attempt to relitigate the liability determinations as inconsistent with both the previous decision in this case and this Court's decision in *Winstar*. 04-1557 Pet. App. 139a-142a. The court of appeals also affirmed the trial court's determinations on remedies, one of which—replacement costs (*see id.* at 14a)—is the subject of CalFed's petition in No. 04-1557. *See* note 8, *infra*.

determinations rest "on undisputed facts" (U.S. Pet. 4), but contends that there is no "evidence of a mutual intent to contract" (*id.* at 20) and insists that "there was nothing present in the record that would permit . . . the conclusion that there were contracts" (*id.* at 23 (emphasis omitted)). Indeed, the government devotes several pages of its cross-petition to a discussion of its interpretation of the record evidence and whether "the documents suggest[ ] an exchange of contractual commitments." *Id.* at 17; *see also id.* at 16-19 (requesting this Court's review of, *inter alia*, various merger applications, correspondence between CalFed and Bank Board, resolutions adopted by Bank Board, forbearance letters, and internal CalFed documents).

The government thus asks this Court to undertake precisely the kind of case-specific factual review that this Court expressly *declined* to perform in *Winstar* itself. In *Winstar*, as here, the Federal Circuit had affirmed the trial court's summary judgments as to contract liability. *See* 64 F.3d 1531, 1540-44 (Fed. Cir. 1995) (en banc). While this Court granted the government's petition to consider (and, ultimately, reject) the availability of certain defenses asserted by the government, the Court left undisturbed the lower courts' determinations that the goodwill contracts at issue had been formed: *"[W]e are in no better position than the Federal Circuit and the Court of Federal Claims to evaluate the documentary records of the transactions at issue."* 518 U.S. at 860-61 (emphasis added).[4]

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[4] The *Winstar* Court's acceptance of the lower courts' determinations regarding contract formation was simply a particularized application of the "two-court rule," which provides that when two lower courts agree on the facts, this Court will not conduct its own independent review of the evidentiary record absent extraordinary circumstances. *See, e.g., Exxon Co. U.S.A.* v. *Sofec, Inc.*, 517 U.S. 830, 840-41 (1996) (declining to reconsider factual conclusion of lower

The government has not even attempted to explain why, in the circumstances of *this* case, this Court is in any better position than the courts below to resolve the question whether the contemporaneous evidence establishes the existence of goodwill contracts. That is undoubtedly because, as in *Winstar* itself, the question of contract formation in this case reflects the application of settled legal principles to undisputed facts—an inadequate basis for plenary review by this Court. *See, e.g.*, *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts").

In any event, both courts below conducted a careful and thorough review of the evidentiary record in concluding that the government and CalFed manifested a mutual intention to contract. The courts below faithfully applied the teaching of *Winstar* in focusing on "the realities of the transaction" and scrutinizing the contemporaneous documents surrounding each acquisition. Both lower courts analyzed each element of contract formation—offer, acceptance, and consideration—and determined, based on the undisputed facts and a careful comparison between the documentary evidence in this case and the original *Winstar* cases, that the government entered into binding contracts with CalFed. That the government interprets the evidence differently can hardly justify disturbing the considered judgment of the two lower courts that have reviewed the documents in question and reached identical conclusions.

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courts when petitioner failed to make an "obvious and exceptional showing of error") (citation omitted); *Goodman* v. *Lukens Steel Co.*, 482 U.S. 656, 665 (1987) (when "both courts below hav[e] agreed on the facts, we are not inclined to examine the record for ourselves absent some extraordinary reason for undertaking this task"); *see generally* Stern et al., *Supreme Court Practice* § 4.14 at 249-50 (8th ed. 2002).

The Federal Circuit agreed with the trial court that "'the factual record[ ] . . . show[s] intent to contract with the government for specified treatment of goodwill, and documents such as correspondence, memoranda and [FHLBB] resolutions confirm that intent.'" 04-1557 Pet. App. 7a (quoting *id.* at 105a). The court of appeals stated that, "[b]ased on all of the contemporaneous documents in each of the three transactions," it had "no doubt that both the government and Cal Fed provided consideration for the agreements," and that "the FHLBB and the FSLIC were contractually bound to recognize the supervisory goodwill and the amortization periods reflected in the forbearance letters." *Id.* at 8a. Accordingly, the court properly concluded that "[j]ust as in [*Winstar*], all of the necessary elements of contract formation are present here, and the parties are bound by the terms of that contract." *Id.* at 9a.

The conclusion of both lower courts that goodwill contracts were formed is plainly correct. In each of the three transactions, CalFed made an offer to contract with the government, promising to acquire one or more failing thrifts in exchange for the right to include supervisory goodwill in calculating its regulatory capital. *See* A5002171-73, A5002174-83 (Southeast offer); A5002254-64, A5002329-31 (Brentwood offer); A5002335-46, A5002557 (Family offer). The government accepted each of these offers. *See* A5002162 (acceptance of Southeast offer by FHLBB resolution); A5002319-24 (acceptance of Brentwood offer by FHLBB resolution and forbearance letter); A5002548-61 (acceptance of Family offer by FHLBB resolution and forbearance letter). And each side provided consideration: CalFed assumed the assets and liabilities of the acquiring institutions (which converted the government's obligations into obligations of CalFed), whereas the government pledged favorable regulatory treatment (and in the case of Southeast, cash assistance).

2. The government renews its contention, rejected once already by this Court in *Winstar*, that the lower court confused regulatory action with contractual undertakings. U.S. Pet. 15. This theme permeates the government's cross-petition. In the government's view, the lower courts' misreading of regulatory approvals as contractual commitments "conflicts with long-standing principles of administrative law" and "threatens . . . to replace ordinary review of agency action under the Administrative Procedure Act with entirely different standards applicable to contractual commitments." *Id.* at 24, 28-29.

The government's attempt to distinguish between the FHLBB's and FSLIC's "contractual" undertakings and their "regulatory" undertakings is nothing less than an attempt to reargue *Winstar*, where the Court held that "[t]he inescapable conclusion . . . is that the Government's 'regulatory' and 'nonregulatory' capacities were fused in the instances under consideration." 518 U.S. at 893-94. Contrary to the government's position (*see* U.S. Reply Br. in No. 01-698 at 10), the "instances under consideration" in *Winstar* were *not* limited to transactions involving Assistance Agreements, but rather encompassed all transactions in which the United States made goodwill promises to induce healthy thrifts to acquire failing institutions in order to avoid governmental liabilities. Indeed, the Court dismissed as "fundamentally implausible" the government's theory that goodwill promises were simply matters of regulatory grace, and noted that the government was protecting its own financial interests by "convert[ing] some of its financial insurance obligations into responsibilities of private entrepreneurs." 518 U.S. at 862-63, 894. *Winstar* thus makes clear that the government acted as both a regulator *and* a contractor in making the goodwill promises,

and it is liable to the injured parties for breaching those contractual commitments.[5]

3. In *Winstar*, this Court recognized that the government's goodwill promises induced numerous acquisitions of failing thrifts and constituted binding contracts. The government's sole basis for distinguishing *Winstar* is that the transactions at issue in *Winstar* involved Assistance Agreements that included integration clauses, whereas the Brentwood and Family transactions did not. U.S. Pet. 19-20. The absence of an Assistance Agreement also serves as the government's sole basis for distinguishing the Brentwood and Family transactions from the Southeast transaction, which served as the model for the subsequent Brentwood and Family transactions, and which the government concedes resulted in a contract. *Id.* at 5.

As the lower courts correctly recognized, the absence of an Assistance Agreement containing an integration clause is not a material failing where, as here, there is a record of contemporaneous documents evidencing a mutual intent to contract. In its *Winstar* rul-

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[5] The Federal Circuit's post-*Winstar* decisions amply demonstrate that, contrary to the government's unfounded concerns, the lower courts have declined to read *Winstar* as authorizing a departure from established law. *See, e.g.*, *Cienega Gardens* v. *United States*, 162 F.3d 1123, *superseded by* 194 F.3d 1231 (Fed. Cir. 1998). Rather, the Federal Circuit has undertaken a case-by-case analysis, finding contract liability on facts similar to those in *Winstar* and this case (*e.g.*, *Fifth Third Bank* v. *United States*, 402 F.3d 1221 (Fed. Cir. 2005)), and denying liability where the facts do not establish all necessary elements of contract formation (*e.g.*, *D&N Bank* v. *United States*, 331 F.3d 1374 (Fed. Cir. 2003); *Anderson* v. *United States*, 344 F. 3d 1343 (Fed Cir. 2003)). *See* U.S. Pet. 27-28 & n.6. The very cases cited by the government point up the fact-specific nature of the liability determination.

ing, the Federal Circuit held that "all of the contemporaneous documents"—including, as here, FHLBB resolutions and correspondence between the Bank Board and acquiring institutions—established that the government had entered into goodwill contracts. 64 F.3d at 1540-44. This Court agreed that "the realities of the transaction" demonstrated that the contemporaneous documents were "contractual commitments, not mere statements of policy." 518 U.S. at 863.

Indeed, the government concedes that a contract was formed in the Southeast transaction (U.S. Pet. 4), and the *sole* difference between that transaction and the Brentwood and Family transactions is the existence of an Assistance Agreement that happened to include an integration clause. But the undisputed, contemporaneous evidence established that the regulators did not view the presence or absence of an Assistance Agreement as having any bearing on the government's obligations. Assistance Agreements were included only in transactions that involved substantial cash payments by the government, and were never intended to distinguish between contractual and regulatory actions. As D. James Croft, the government's senior regulator at the time, who was ultimately responsible for recommending that the FHLBB approve all three transactions at issue, has averred: "An acquiring institution, such as CalFed, would have had the same level of assurance as to the treatment of goodwill in both types of transactions, and the FHLBB certainly did not draw a distinction nor intend that acquiring institutions draw any distinctions as to the treatment of goodwill between assisted and unassisted transactions." A5002914-15; *see also ibid.* (according to Dr. Croft, Assistance Agreements "had no effect on the nature or extent to which the FHLBB believed itself bound by its agreement").[6]

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6 The government's belated attempt to disavow the sworn statement of the official responsible for reviewing

The government's assertion that *Winstar* "does not suggest that Bank Board approvals were contractual in nature" (U.S. Pet. 20) is refuted by *Winstar* itself, which agreed with the Federal Circuit that "the realities of the transactions favored reading those documents"—*i.e.*, documents *other than* the Assistance Agreements, such as FHLBB resolutions and forbearances—"as contractual commitments." 518 U.S. at 863. Contrary to the government's position (U.S. Pet. 21; *see also* U.S. Reply Br. in No. 01-698 at 9), no separate document labeled "contract" or "agreement" was required to "contractualize" the government's express promises. Indeed, the government's assertion that "a separate contract" containing an integration clause was necessary to give Bank Board resolutions "a [contractual] significance in addition to their status as regulatory documents" (U.S. Pet. 20-21) defies black-letter contract law, for "it is well-settled law that several writings executed between the same parties . . . may be read together as forming parts of one transaction." *Bailey* v. *Railroad Co.*, 84 U.S. 96, 108 (1873). *See also Ryan* v. *United States*, 136 U.S. 68, 83 (1890) ("a complete contract . . . may be gathered from letters, writings and telegrams between the parties"); 1 A. Corbin, *Corbin on Contracts* § 2.10 at 165, 171 (1993); I E. Farnsworth, *Farnsworth on Contracts* § 3.3 at 187 (1998). Thus, contracts need not have an integration clause to be binding (or even integrated), regardless of how many documents are involved. *Restatement (Second) of Contracts* § 209 & cmt. *b* (1983); 3 A. Corbin, *Corbin on Contracts* § 573 at 359 n.3 (1960); *Steinke* v. *Sungard Fin. Sys., Inc.*, 121 F.3d 763, 771 n.5 (1st Cir. 1997).[7]

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these transactions (*see* U.S. Pet. 17-18 n.3) merely points up the revisionism that pervades the government's *Winstar*–related briefing.

[7] The government's reliance on *Charter Federal Savings Bank* v. *OTS*, 976 F.2d 203 (4th Cir. 1992), for the

The government's argument ultimately amounts to a claim that, in determining whether a contract existed, the court below gave inadequate weight to the absence of "documents [that] identified themselves as 'agreements,' and [that] included standard contractual clauses, such as integration clauses." U.S. Pet. 19; *see also id.* at 22-24. But the government fails to cite even a single authority for the proposition that either of these is a necessary prerequisite to contract formation, for the simple reason that they are not. Thus, while the government strives to cast its argument in terms of "legal error," its real complaint is that the courts below drew the wrong inferences from the undisputed facts. That factbound issue does not warrant plenary review.

4. The government also argues that the decision below is inconsistent with the principle set forth in *National Railroad Passenger Corp.* v. *Atchison, Topeka & Santa Fe Railway Co.*, 470 U.S. 451, 466-67 (1985), that "absent 'an adequate expression of an actual intent' of the State to bind itself, this Court simply will not lightly construe that which is undoubtedly a scheme of public regulation to be, in addition, a private contract to which the State is a party" (citation omitted). The government claims the lower courts erred because the FHLBB and the FSLIC did not provide an "adequate expression" of the government's intent to be bound. U.S. Pet. 26.

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proposition that "regulatory" documents cannot manifest the government's intent to form a contract (U.S. Pet. 24 n.5), is misplaced. The *Charter* court acknowledged that the forbearance letter at issue "may constitute an express agreement, [but] its terms have expired and it is now moot." 976 F.2d at 210 n.11. Moreover, the *Charter* court based its decision on the government's broad reading of the "unmistakability" doctrine (*id.* at 212), a reading that was emphatically rejected by this Court in *Winstar*.

This argument is a transparent attempt to revive the "unmistakability" doctrine the government unsuccessfully urged upon this Court in *Winstar*. In *Winstar*, the government, as here, argued that the thrifts needed to show that the government had made a clear and unequivocal statement of intent to be bound before it could be deemed to have entered into a contract. Specifically, the government contended that "contracts that limit the government's future exercises of regulatory authority . . . will be recognized only rarely, and then only when the limitation on future regulatory authority is expressed in unmistakable terms." 518 U.S. at 871 (quoting Brief for United States at 16). The plurality opinion rejected this argument, explaining that "[s]ince the facts of the present case demonstrate that the Government may wish to further its regulatory goals through contract, we are unwilling to adopt any rule of construction that would weaken the Government's capacity to do business by converting every contract it makes into an arena for unmistakability litigation." *Id.* at 886. As Justice Souter explained for the plurality, there was "no need for an unmistakably clear 'second promise' not to change the capital requirements," adding that "it is sufficient that the Government undertook an obligation that it subsequently found itself unable to perform." *Id.* at 887. While Justice Scalia's concurring opinion did not reject the applicability of the unmistakability doctrine *per se*, he declared that "the doctrine has little if any independent legal force beyond what would be dictated by normal principles of contract interpretation." *Id.* at 920 (Scalia, J., concurring in judgment).

Significantly, the government does not maintain that application of these "normal principles of contract interpretation" commands a result different than that reached by the two lower courts in this case. In fact, the government's position is quite to the contrary: It insists that it is entitled to special rules when contracting. Thus, while conceding that this Court has dispensed with the unmistakability doctrine as a matter of contract *interpre-*

tation, the government continues to invoke the identical doctrine as a matter of contract *formation*. *See* U.S. Reply Br. in No. 01-698 at 6 n.4. But this plea for special treatment conflicts with this Court's recognition that "[w]hen the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals." *Mobil Oil Exploration & Producing Southeast, Inc.* v. *United States*, 530 U.S. 604, 607 (2000) (quoting *Winstar*, 518 U.S. at 895).

The courts below did not err by refusing to create a special rule for the government. Rather, they faithfully applied *Winstar* in examining the "the realities of the transaction" (518 U.S. at 863), and concluding that the documentary record evidenced the government's intent to be bound. The government has put forth no persuasive reason for this Court to revisit that case-specific determination.[8]

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[8] Unlike the government's conditional cross-petition, CalFed's petition (in No. 04-1557) presents a substantial question regarding the appropriate remedy for the government's breach of *Winstar*-type contracts. The government asserts, however, that if the Court decides to address the remedial issue presented by CalFed, "it should also consider the antecedent liability issue raised" in the government's cross-petition. U.S. Pet. 15. Contrary to the government's suggestion, resolution of this remedial issue would in no way be advanced by a predicate determination that the government had in fact entered into goodwill contracts with CalFed. The government has *conceded* that a contract was formed in the Southeast transaction, and "do[es] not dispute that the United States is liable for breach of that contract after enactment of FIRREA" (*id.* at 6); thus, the remedial issue would remain open even if this Court were somehow to reverse the liability determinations as to the Brentwood and Family transactions. Moreover, CalFed's petition in No. 04-1557 seeks a GVR order in light of an intervening Federal Circuit decision on the remedial issue; as the government

CONCLUSION

The conditional cross-petition for a writ of certiorari should be denied.

Respectfully submitted.

MARK A. PERRY
Counsel of Record
ANDREW S. TULUMELLO
PAUL BLANKENSTEIN
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Counsel for Respondent

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appears to acknowledge (U.S. Pet. 3), to afford such relief the Court need not revisit determinations on contract formation in which both lower courts concurred, and that, in any event, are correct.

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No. 04-1709

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

CALIFORNIA FEDERAL BANK, FSB

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

PAUL D. CLEMENT
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

TABLE OF AUTHORITIES

Cases: Page

United States v. *Winstar*, 518 U.S. 839 (1996) 4

Mobil Oil Exploration & Producing Southeast, Inc. v. *United States*, 530 U.S. 604 (2000) 6

Statute:

12 U.S.C. 1729(f) (1982) 4

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REPLY BRIEF FOR THE UNITED STATES

As explained in the government's brief in opposition in No. 04-1557, the Court should deny CalFed's petition for a writ of certiorari in this case. If the Court were to grant CalFed's petition, however, it should also grant the government's cross-petition. The cross-petition challenges the court of appeals' antecedent holding that, despite the absence of any assistance agreement or other document of a contractual nature in connection with CalFed's acquisition of the Brentwood and Family thrifts, FSLIC must be held to have undertaken a contractual commitment to guarantee CalFed against loss resulting from a statutory change in regulatory policy.

The court of appeals seriously erred in failing to recognize that, in a regulatory context in which government approval is necessary before a private transaction can go forward, the application for and grant of such

approval does not result in a contractual relationship—at least in the absence of concrete and independent documentation, entirely lacking here, that the parties intended to form such a relationship. That issue is of substantially greater significance than the question presented in CalFed's petition for certiorari. Unlike the question presented in that petition, which appears to be limited in its significance to some of the remaining 39 *Winstar*-related cases, the question presented in the cross-petition could be of more general significance not only to a number of the remaining *Winstar*-related cases, but also to other cases in which regulated entities seek to convert grants of regulatory approval for transactions between private parties into contractual commitments by the regulatory agency, resulting in the potential for substantial and wholly unwarranted monetary liability on the part of the United States.

1. CalFed's primary contention (Br. in Opp. 11) is that the court of appeals and trial court "conducted a careful and thorough review of the evidentiary record in concluding that the government and CalFed manifested a mutual intent to contract," and that review by this Court is therefore unnecessary.

It is true that the courts below found all of the elements of contract formation—indeed, the court of appeals (although not the trial court) found all of the elements of an *express* contract—in the transactions at issue here. But the courts made those findings because they felt free to construe an application for regulatory approval as an "offer," a discussion between regulator and regulated entity of the terms of the private transaction and its impact on the public interest as "negotiations," and an ultimate grant of regulatory approval as an "acceptance." Under the same rationale, courts

could, contrary to settled principles of sovereign authority and administrative law, find the facts of a great many regulatory approvals to result in contracts between the regulated entity and the regulatory agency.

The cross-petition does not seek further review of any factual determination by the courts below. Indeed, although CalFed argues that all that is at issue here is a factual dispute, CalFed does not cite or quote any document or any other piece of contemporaneous evidence in which either CalFed or the federal regulatory agency characterized their relationship as contractual in nature or manifested a mutual intent to form a contract.*

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* The only item CalFed cites as evidence that the parties had an intent to form a contract is the declaration of D. James Croft, a former Bank Board employee. See Br. in Opp. 15. That declaration however, is not a document of FSLIC itself, and it was submitted by Dr. Croft in a personal capacity more than 14 years after the transaction at issue. Moreover, although CalFed quotes Dr. Croft's declaration for the proposition that CalFed had a certain level of "assurance" regarding the treatment of goodwill, Dr. Croft's declaration does not state—and it cites no document or other evidence supporting the quite different proposition—that FSLIC actually entered into a *contract* guaranteeing to make CalFed whole for any monetary losses resulting from a change in regulatory policy.

In any event, as the cross-petition notes (at 17-18 n.3), Dr. Croft's testimony was disputed by a declaration of former General Counsel Lawrence Hayes of the Bank Board, and it therefore could not have supported the grant of summary judgment on liability to petitioner. Although CalFed argues that this is merely a "belated attempt to disavow the sworn statement" of Dr. Croft and "revisionism" by the government, Br. in Opp. 15 n.6, the government has argued from the beginning of this case that no contract was formed. Moreover, CalFed does not take issue with the government's contention that Dr. Croft's statement was in fact contravened by Mr. Hayes's declaration. It is not "revisionism," but black-letter law, that disputed statements—even sworn statements—cannot support a grant of summary judgment. Dr. Croft's statement is at most a years-after-the-fact revisiting of events

Rather, the cross-petition seeks review of the court of appeals' underlying *legal* determination that, even in a situation in which regulatory approval is needed for a private transaction, and even when official documents and other factual circumstances of a case show nothing beyond such regulatory approval, and even when the parties themselves never manifested any intent in any document to enter into a contractual (as opposed to regulatory) relationship, a court is nonetheless free to recharacterize the facts in contractual terms

As the cross-petition notes (Cross-Pet. 24-25), such recharacterization is inconsistent with longstanding principles of sovereign authority and administrative law, which necessarily reserve to the government the authority to modify regulatory regimes in light of the need to serve the public interest in the face of changing circumstances and governmental policies.

2. CalFed asserts (Br. in Opp. 14) that "the government's sole basis for distinguishing [*United States* v. *Winstar*, 518 U.S. 839 (1996)] is that the transactions at issue in *Winstar* involved Assistance Agreements that included integration clauses, whereas the Brentwood and Family transactions did not." That, however, is no mere technical distinction, as CalFed would have it. That difference goes to the very heart of this case. The Assistance Agreement, with its attendant formalities, was the recognized vehicle employed by FSLIC when it chose to make a *contractual* commitment to the acquiring thrift. For example, as pointed out in the cross-petition (at 21-22) and as required by statute (see 12

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at the time of the regulatory approval. It does not suggest that the parties manifested any contemporaneous intent to form a contract, rather than merely to seek and grant, respectively, the necessary regulatory approval for a private transaction.

U.S.C. 1729(f) (1982)), no guarantee against losses or other financial assistance could be extended as part of such an assistance agreement unless FSLIC specifically found that the amount of the assistance was reasonably necessary to save the cost of liquidating the failing insured institution. FSLIC in fact made that determination in connection with its formal assistance agreements for the acquisitions in *Winstar* and the Southeast acquisition in this case, but it did not make any such determination with respect to the Brentwood and Family acquisitions in this case. See Cross-Pet. 21-22. The absence of any such determination, which is a statutorily prescribed precondition to the extending of guarantees or other contractual assistance by FSLIC, powerfully confirms what is in any event evident from the absence of assistance agreements covering the Brentwood and Family acquisitions: there was simply no contract between FSLIC and CalFed as to those acquisitions.

We may assume for present purposes, however, that, although the *presence* of an assistance agreement may make manifest the intent of the parties to enter into a contractual—as opposed to a regulatory—transaction, the *absence* of a formal assistance agreement is not decisive. For even on that assumption, what is decisive in this case is the absence of *any* indication, in the form of *any* contemporaneous document or statement, that the parties intended anything in addition to seeking, and granting, the legally necessary, see Cross-Pet. 3-4, regulatory approval of a private transaction.

CalFed contends (Br. in Opp. 19) that our cross-petition is a "plea for special treatment" that conflicts with the principle that "[w]hen the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts

between private individuals." *Mobil Oil Exploration & Producing Southeast, Inc.* v. *United States*, 530 U.S. 604, 607 (2000) (quoting *Winstar*, 518 U.S. at 895 (plurality opinion)). The question in this case, however, is precisely whether the government *has* "enter[ed] into contract relations" with a private party. Private parties do not find themselves in a posture analogous to that of regulated entity and regulatory agency. For that reason, the legal "rights and duties" that attach to such a regulatory—as opposed to contractual—relationship are indeed inapplicable to dealings between private parties. That is merely a recognition of well-settled principles of sovereign authority and administrative law, and it does not conflict in any way with the recognition that, when the government does enter into a contract, its rights and duties are generally the same as those of private parties.

* * * * *

For the foregoing reasons, and those stated in the cross-petition, the petition for a writ of certiorari should be denied. If the Court decides to grant the petition, however, the government's cross-petition for a writ of certiorari should also be granted.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

AUGUST 2005